No. 83-106

In The
Supreme Court of the United States
October Term, 1983

H. M. TRIMBLE & SONS, LIMITED,
Petitioner,

vs.

KINGSLEY AND KEITH (Canada) LIMITED and KINGSLEY AND KEITH CHEMICAL CORPORATION,
Plaintiffs/Respondents,

and

MERCER INTERNATIONAL CORPORATION and INTERSTATE CHEMICAL CORPORATION,
Defendants/Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTION PRESENTED

Does Pennsylvania's exercise of jurisdiction over petitioner, a foreign trucking company, satisfy the requirements of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?

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BRIEF OF PLAINTIFFS/RESPONDENTS, KINGSLEY AND KEITH (Canada) LIMITED AND KINGSLEY AND KEITH CHEMICAL CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the authority of Rule 22 and in the manner provided by Rules 33 and 34 of the Supreme Court Rules, Kingsley and Keith (Canada) Limited and Kingsley and Keith Chemical Corporation respond to the petition of H. M. Trimble & Sons, Limited and request that this Court deny the petition on the basis of the facts and

authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Pennsylvania in this case is reported in *Kingsley and Keith (Canada) Limited and Kingsley and Keith Chemical Corporation v. Mercer International Corporation and Interstate Chemical Corporation and H. M. Trimble & Sons Limited*, — Pa. —, 456 A. 2d 1333 (1983).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U. S. C. § 2101(c).

STATEMENT OF THE CASE

This appeal relates to the effort of the plaintiffs (one a Canadian corporation and the other a New Jersey corporation) to invoke Pennsylvania's long-arm jurisdiction in order to seek redress against three defendants, two of which are Pennsylvania corporations and one of which is a Canadian corporation. The amended complaint avers that Kingsley and Keith (Canada) ordered 80,000 pounds of methylene chloride from Kingsley and Keith (New Jersey) on or about October 4, 1974, in order to fill a contract with Celanese (Canada). In order to fill this order,

it is averred that Kingsley and Keith (New Jersey) thereafter ordered two tank cars of methylene chloride (approximately 40,000 pounds each) from Mercer International Corporation, a Pennsylvania corporation, and arranged with H. M. Trimble & Sons, Limited (hereinafter referred to as Trimble) to transport said methylene chloride to Canada.

The amended complaint further avers that, on or about October 12, 1974, Interstate Chemical Corporation, also a Pennsylvania corporation and an affiliate of Mercer International Corporation, delivered a tank load of the said methylene chloride to Indianapolis, Indiana, for transferral into a Trimble tank truck. On or about November 12, 1974, it is averred that Interstate Chemical Corporation delivered a second tank load of methylene chloride to a Trimble tank truck in Mercer, Pennsylvania, at the place of business of Mercer International Corporation.

The amended complaint also avers that both tank trucks of methylene chloride were found to be contaminated upon delivery to Celanese (Canada), and damages are asserted for breach of the implied warranty of merchantability and the implied warranty of fitness for a particular purpose.

The amended complaint, in paragraph 12, avers that Trimble's connection with the Commonwealth of Pennsylvania is that a load of methylene chloride was delivered to a Trimble tank truck in Mercer, Pennsylvania, on or about November 12, 1974.

The pre-trial discovery discloses that the Pennsylvania corporations named as defendants have had no

business transactions with Trimble (or any other affiliate corporations within the Trimac Transportation System) except the business relationship arising under the order placed by the plaintiffs, that Trimble does not ship any merchandise directly or indirectly into or through the Commonwealth of Pennsylvania, and that Trimble has had no connection with the Commonwealth of Pennsylvania other than the load of methylene chloride which was picked up in Mercer, Pennsylvania, on or about November 12, 1974.

By order dated January 15, 1979, the Court of Common Pleas of Mercer County dismissed Trimble's preliminary objections under Pa. R. C. P. 1017(b)(1) and granted the plaintiffs' petition for leave to invoke the substituted service provisions of Pa. R. C. P. 2180(c). Trimble's motion for reconsideration was refused by order dated February 13, 1979; whereupon, Trimble lodged an appeal with the Superior Court of Pennsylvania.

By opinion and order filed on October 24, 1980 (as reported at 426 A. 2d 618, but later withdrawn from publication), the three-judge Superior Court panel which heard the appeal reversed the Common Pleas order on the ground that the record did not disclose that the cause of action arose from the Canadian defendant's activities within the forum state, and on the ground that there was insufficient showing that the Canadian defendant's contacts with Pennsylvania were "so continuous and substantial" as to justify the exercise of long-arm jurisdiction over a cause of action occurring beyond Pennsylvania's borders.

Upon the plaintiffs' application for reargument, the Superior Court entered an order on March 30, 1981, re-

fusing reargument but allowing reconsideration by the three-judge panel. By opinion and order filed on June 26, 1981 (as reported at 291 Pa. Super. Ct. 96, 435 A. 2d 585), the three-judge panel reversed itself, withdrew its earlier opinion and affirmed the Common Pleas order. Trimble's application for reargument was denied by order dated October 9, 1981; whereupon, Trimble filed a petition for allowance of appeal with the Supreme Court of Pennsylvania. Said petition was granted by order dated December 22, 1981, and oral argument was heard by the full seven-justice court on September 23, 1982.

Chief Justice O'Brien's term expired on December 31, 1982; hence, he did not participate in the decision announced on February 9, 1983. The remaining six justices were equally divided, with Mr. Justice Roberts (joined by Justices Larson and Flaherty) filing an opinion in support of affirmance, and Mr. Justice Nix (joined by Justices McDermott and Hutchinson) filing an opinion in the support of reversal. These opinions were accompanied by a per curiam order affirming the second opinion of the Superior Court on the ground that the Supreme Court was equally divided.

Trimble has now filed a Petition for Writ of Certiorari to your Honorable Court, based on the question of whether or not the Pennsylvania courts have properly exercised jurisdiction over it as a foreign corporation pursuant to the Fourteenth Amendment of the Constitution of the United States. That issue is presently for determination for your Honorable Court.

REASONS WHY THE WRIT SHOULD NOT ISSUE

Pennsylvania's exercise of jurisdiction over petitioner, a foreign trucking company, satisfies the requirements of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

In *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), your Honorable Court proclaimed the "minimum contacts" test for determining whether a court may constitutionally exercise in personam jurisdiction over a foreign corporation when it stated:

> ". . . due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that maintenance of the suit does not offend the traditional notions of fair play and substantial justice."

In addition, in *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958), your Honorable Court provided that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Finally, in the recent case of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, 100 S. Ct. 559, 62 L.Ed.2d 490 (1980), your Honorable Court described the concept of "minimum contacts" as "protecting the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal

sovereigns in a federal system." The Court also commented in that case on the concepts of "reasonableness" and "fairness", including the desire to protect the plaintiffs' interest in obtaining convenient and efficient relief.

In the Opinion in Support of Affirmance by the Supreme Court of Pennsylvania in the present case, Chief Justice Roberts stated at 456 A. 2d 1334, 1335, that:

> "The record amply supports the order of the Court of Common Pleas of Mercer County sustaining its exercise of jurisdiction over appellant, H. M. Trimble & Sons, Limited. As the Opinion in Support of Reversal acknowledges, appellant 'purposely availed itself of the privilege of conducting activities within the forum state' by partially performing the contract with appellees in Pennsylvania. Appellant entered into a contract to transport goods manufactured in Pennsylvania from Pennsylvania to Canada. In order to take custody of the goods in Pennsylvania, appellant entered into a 'trip lease' of its equipment with Coastal Tanklines, Limited, which authorized appellant to enter Pennsylvania for that purpose. (citations omitted) . . . The state's interest in assuring that a contract for the safe transportation of Pennsylvania goods is properly performed must be evident. Not only does Pennsylvania have an interest in highway safety; it also has an interest in assuring that Pennsylvania manufacturers do not bear unwarranted liability for goods proper when made and delivered to the buyer's carrier (citation omitted)."

The above review of the facts in the present case, as well as the application of those facts to the law on the question of jurisdiction as it has been presented by your Honorable Court, makes it clear that the exercise of jurisdiction over H. M. Trimble & Sons, Limited, by the courts of Pennsylvania is consistent with the precepts of *Inter-*

national Shoe Co. v. Washington, supra. For the very reasons set forth above by Chief Justice Roberts, the application of the law to this jurisdictional question is consistent with the rulings of your Honorable Court and the Petition for Writ of Certiorari should be denied.

The petitioner herein and the Opinion in Support of Reversal filed by the Supreme Court of Pennsylvania in this case feel the need for review by your Honorable Court of the three-pronged test for determining long-arm jurisdiction initially set forth in *Proctor & Schwartz, Inc. v. Cleveland Lumber Co.,* 228 Pa. Super. 12, 323 A.2d 11 (1974). The three-pronged test established in that case is as follows:

> "First, the defendant must have purposefully availed itself of the privilege of acting within the forum state thus invoking the benefits and protections of its laws. Secondly, the cause of action must arise from defendant's activities within the forum state. Lastly, the acts of the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over it reasonable."

The primary issue raised by the petitioner is a challenge to the second prong of the test which provides that the "cause of action must arise from the defendant's activities within the forum state." Petitioner interprets this language to say that the cause of action itself must arise in the forum state and that, in the present cause, because it cannot be determined that the contamination of the methylene chloride occurred in Pennsylvania, the cause of action did not occur in Pennsylvania and, therefore it is improper for the courts of Pennsylvania to exercise jurisdiction over H. M. Trimble & Sons, Limited.

The three-pronged test set forth in the *Proctor & Schwartz* test is nothing more than guidelines, based upon the law established in *International Shoe* and its progeny, against which due process should be analyzed. The second prong of the *Proctor & Schwartz* test is taken directly from your Honorable Court's opinion in *International Shoe Co. v. Washington,* supra, at 326 U.S., at 319, 66 S. Ct. at 160, 90 L. Ed. 95 (1945), which stated:

> "To the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of *or are connected with the activities within the state,* a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." (Emphasis added.)

Despite the position taken by the petitioner, the administration of the second prong of the three-prong test by the appellate courts of Pennsylvania has been consistent with the precepts established by your Honorable Court and this can be seen by examining the second prong of the *Proctor & Schwartz* test along with its application to the present case and several additional Pennsylvania cases.

Initially, the first part of the *Proctor & Schwartz* three-prong test is significant because once the "purposefully availed" test (test one) is satisfied the second part of the test can be satisfied by showing that the activities which satisfied the "purposefully availed" test have given rise to the cause of action sued upon. In *Proctor & Schwartz, Inc.,* supra, 228 Pa. Super. at 20, 323 A. 2d at 15, the Superior Court stated:

> "The second analytical step requires only that the cause of action arise from the defendant's activities within the forum state. The mere fact that the defendant availed itself of the privilege of doing business in Pennsylvania will not support a cause of action which is unrelated to the defendant's activities in this state. We find in the instant case that the plaintiff's cause of action arose directly from the defendant's acts within this state. The activity which satisfies the 'purposefully availed' test above is the entering into contractual obligations. The cause of action arises from the breach of those same obligations."

This statement from the *Proctor & Schwartz* case establishes the necessary link between the first and second tests. That is, if the defendant purposefully avails itself of the privilege of acting within the forum state, the second test is met, not if the cause of action is unrelated to defendant's activities in the forum state, but only if the cause of action arose out of those activities in the forum state. The court does not require that the cause of action itself arise in Pennsylvania, but only that the cause of action arise from (be related to) the defendant's activities within the forum state.

In the instant case, Trimble engaged in activities to purposefully avail itself of the privilege of acting within the forum state by not only entering into a contract that contemplated Trimble's performance in Pennsylvania, but also pursuant to that contract, Trimble entered Pennsylvania (test one). The cause of action (test two) that then followed arose not from some unrelated activity in Pennsylvania but, rather, from a breach of the duty of the activity called for to establish the first test—that is, performance of the contract to deliver methylene chloride

to Celanese Corporation. It has not been and cannot be shown where the actual contamination of methylene chloride occurred, although there is a strong possibility that it occurred in Pennsylvania during the time that it was held by the supplier or when being transferred from the supplier to the appellant's truck. However, it is not necessary to show that the contamination actually occurred in Pennsylvania, but only that the performance of the contract which brought the appellant into Pennsylvania was related to the cause of action. Therefore, it is submitted that the second part of the *Proctor & Schwartz* test has been met.

In the revised opinion filed in this case on June 26, 1981, as reported at 435 A.2d 585, the Superior Court stated, at 591, after stating that the second test set forth in *Proctor & Schwartz* had been met in the instant case, that "we recognize that it may be argued that this is too broad a reading." The Superior Court's ruling was not too broad a reading of the *Proctor & Schwartz* test, but rather the necessary and logical reading of it when read in conjunction with the first test, as it must be.

In the case of *Koenig v. International Brotherhood of Boilermakers et al.*, 284 Pa. Super. 558, 426 A.2d 635 (1980), the Superior Court, at 642, 643, in an assumpsit action against a New York labor union, found that the entering into a contract which contemplated some of the work thereunder to be performed in Pennsylvania met the "purposefully availed" test (test one) and that the cause of action arose from the breach of those same obligations. In that case, the Court permitted jurisdiction of the Pennsylvania courts for a failure to pay employees

in New York for services, some of which were to be performed in Pennsylvania pursuant to an employment contract. The *Koenig* case re-emphasizes the importance of considering the first two tests of *Proctor & Schwartz* together in determining whether the activities within Pennsylvania are related to the cause of action that arises.

In the present case, Trimble came into Pennsylvania to make a pickup of methylene chloride as part of a total transaction involving Kingsley and Keith, Mercer International, Trimble, and Celanese. With this shipment, Trimble dealt directly with a Pennsylvania corporation is picking up the methylene chloride and, with this pickup, had an economic impact on the commerce of Pennsylvania. Furthermore, Trimble should reasonably have foreseen that if the methylene chloride was contaminated upon delivery, that the transaction would have consequences in Pennsylvania, since the supplier was located in Pennsylvania and since some of the methylene chloride was transferred into the tanks of Trimble in Mercer, Pennsylvania, where the contamination may well have taken place.

Finally, Trimble, in its petition, incorrectly states the use of jurisdictional standard set forth in *Bork et ux. v. Mills*, 458 Pa. 228, 329 A. 2d 247 (1974). The *Bork* test of "continuous and substantial contacts" only applied to cases in which the cause of action arises beyond Pennsylvania's borders and is unrelated to the activities conducted by a defendant whereby it availed itself of acting within the forum state (Pennsylvania), *Union National Bank of Pittsburgh v. L. D. Pankey Institute*, 284 Pa. Super. 537, 426 A. 2d 624 (1980).

In *Union National Bank of Pittsburgh v. L. D. Pankey Institute*, supra, at 627, the Superior Court indicated that

in determining jurisdiction over a foreign defendant, one first looks to the three-part test of *Proctor & Schwartz* and only after any of that three-part test has not been met, does one turn to the "continuous and substantial contacts" test set forth in *Bork et ux. v. Mills*, supra. This method of determining jurisdiction is also followed in the case of *Koenig v. International Brotherhood of Boilermakers*, supra, at 640. Therefore, in the present case, if the three-part test of *Proctor & Schwartz* was met there was no need to look to the "continuous and substantial contacts test" of *Bork et ux. v. Mills*, supra.

Therefore, by following the tests for jurisdiction established by your Honorable Court in the case of *International Shoe Co. v. Washington* and its progeny and by reviewing how these jurisdictional tests have been applied by the Supreme Court of Pennsylvania, the sustaining of jurisdiction over the petitioner, a foreign trucking company, was reasonable and satisfied the requirements of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

Accordingly, this Court should deny Trimble's Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, Kingsley and Keith (Canada) Limited and Kingsley and Keith Chemical Corpora-

tion submit that H. M. Trimble & Sons' Petition for Writ of Certiorari should be denied.

Respectfully submitted.

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